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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STAFF SERGEANT JOHN W. SUTTON, *PETITIONER,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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56 PP

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Armed Forces erred when, in testing for harmless constitutional error, it quantitatively assessed the sufficiency of remaining lawful evidence to support Petitioner's convictions rather than qualitatively assessing the contributory impact on those convictions of hearsay statements admitted in violation of Petitioner's Sixth Amendment right to confrontation.

II. Whether the United States Court of Appeals for the Armed Forces erred when it failed to consider the contributory impact on Petitioner's sentence of hearsay statements admitted in violation of petitioner's Sixth Amendment right to confrontation.

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STAFF SERGEANT JOHN W. SUTTON,
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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Staff Sergeant John W. Sutton, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 13 September 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 355

(1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, issued on 21 December 1993, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 13 September 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision: The Sixth Amendment of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY (UNIFORM CODE OF MILITARY JUSTICE) PROVISIONS INVOLVED

UCMJ Article: Article 51(a) of the UCMJ states in pertinent part that—

> "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot."

MANUAL FOR COURT-MARTIAL PROVISIONS INVOLVED

Military Rule of Evidence: Military Rule of Evidence 804(b)(3) provides in relevant part:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true."

Rule for Court-Martial: Rule for Courts-Martial 1001(a)(1) provides in pertinent part that—

> "After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence."

STATEMENT OF THE CASE

On 19-22 March 1991 a general court-martial composed of officer members tried Petitioner at Nellis AFB, Nevada. Contrary to his pleas, Petitioner was found guilty of charges alleging that while on temporary duty in Honduras, he and others, in violation of lawful general regulations, engaged in currency exchanges and misuse of their official positions as military postal clerks for personal pecuniary gain. (A summary of the charges and specifications on which Petitioner was arraigned, his pleas, and the findings of the court-martial are provided at Appendix C.) Following his conviction, Petitioner was sentenced to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to airman basic (E-1) and payment of a fine of $84,742.00 (or confinement for an additional 5 years until such fine was paid).

As part of its case-in-chief (apparently in support of specification 4 of Charge II and specifications 1-4 of Charge III), the Government moved for admission of two type-written statements (Pros. Exs. 1 and 2, respectively) purportedly executed by a Mr. Glenn Bergendahl. R. 23. The substance of these statements referenced Petitioner's conversion of local currency into U.S. money orders for Mr. Bergendahl, along with Mr. Bergendahl's unlawful receipt of packages through the military postal system by having them addressed to Petitioner and utilizing an address purportedly provided by Petitioner. Pros. Exs. 1 and 2. The statements also detailed Mr. Bergendahl's involvement with local Honduran authorities and his movements from Honduras to Nicaragua to Panama in the time-frame immediately preceding his execution of the statements. *Id.* Throughout their substance, Mr. Bergendahl's statements referred to Petitioner as the one having conceived of and initiated the transactions in question. *Id.*

In anticipation of defense objection to the hearsay nature of these statements, the Government relied upon Mil. R.

Evid. 804(b)(3) as a basis for their admission, claiming that Mr. Bergendahl was unavailable to testify and the statements represented statements against Mr. Bergendahl's penal interest. R. 24; App. Ex. II. The Government further opined that the statements would not violate Petitioner's Sixth Amendment confrontation rights because they were reliable and would be corroborated by most other evidence in the case and additionally by a prior statement of the accused. R. 24; App. Ex. II.

In response to the Government claims of unavailability, defense counsel argued that the Government had made no good faith efforts to procure Mr. Bergendahl's testimony, R. 26; specifically, that the Government had made no effort to depose Mr. Bergendahl. R. 25, 29. With regard to the Government's claims of Sixth Amendment propriety, defense counsel argued that the statements lacked any indicia of reliability.

Ultimately, the military judge overruled the defense objections to Pros. Exs. 1 and 2, R. 69-70, and they were presented to the members. R. 288-289. Trial counsel made repeated reference to the statements during his findings argument. R. 376, 377, 378, 381, 382, 383. He even explained how the statements had served as a basis for the Government's drafting of charges against Petitioner:

> "Now, if you also look closely at Mr. Bergendahl's statements you will see that he was not paying him the $25.00 a package during the first TDY. And that's why the government withdrew the last few lines of that Specification that he was being paid the 50 Lempira per package."

Too, trial counsel referred to the statements, both implicitly and explicitly during his argument on sentencing. Implicitly, he seized upon the statements' characterization of Appellant as the one having conceived of and

initiated the events at issue: trial counsel several times referenced the "Sutton plan", R. 463, 473, and how, "He [Petitioner] was the mastermind of that, he was the inventor of that." R. 463. Trial counsel explicitly referred to the hearsay statements, telling the members—

> "And if you look at the Bergendahl [statement], towards the end of that eight page statement, you can see the high-level interest concern and turmoil that this whole operation caused when it was finally shut-down in August of 89, the plan that this accused started. You can see directly in that statement the kind of interest that these crimes attracted in Honduras."

R. 465.

The ruling of the military judge admitting Mr. Bergendahl's statements was affirmed the Air Force Court of Military Review. The U.S. Court of Appeals for the Armed Forces subsequently granted review to address:

I

> WHETHER THE MILITARY JUDGE ERRED BY RULING THAT MR. BERGENDAHL WAS UNAVAILABLE WITHOUT REQUIRING THE GOVERNMENT TO SHOW AN ATTEMPT TO OBTAIN MR. BERGENDAHL'S TESTIMONY BY DEPOSITION

II

> WHETHER STATEMENTS, WHICH ACKNOWLEDGE THE DECLARANT'S OWN CRIMINAL LIABILITY BUT WHICH

MADE THE APPELLANT SEEM MORE CULPABLE, MADE WHILE THE DECLARANT WAS BEYOND THE REACH OF THE HONDURAN GOVERNMENT QUALIFY AS STATEMENTS AGAINST INTEREST

III

WHETHER THE ADMISSION OF STATEMENTS OF MR. BERGENDAHL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION SINCE THEY DID NOT MEET THE REQUIREMENTS OF *Idaho v. Wright* [, 497 U.S. 805 (1990)]

After a statement of the case and facts, the Court's majority concluded that it need not resolve the admissibility of Mr. Bergendahl's statements because any error regarding their admissibility as to the offenses was harmless. 42 M.J. at 357. Citing to *Arizona v. Fulminante,* 499 U.S. 279 (1991), the majority opined that the other testimonial and documentary evidence offered against Petitioner "compellingly establish appellant's guilt beyond a reasonable doubt as to each of those offenses." 42 M.J. at 357.

In a concurring opinion, the late Judge Wiss concluded that Mr. Bergendahl's statements failed "muster as trustworthy under Mil. R. Evid. 804(b)(3)." He further noted that—

> "Normally, admission of such evidence, in violation of the rules of evidence and, likely the Sixth Amendment right of confrontation, would compel reversal. Indeed, I confess

that my decision to concur in the majority's conclusion of no prejudice is with some reservation. In the end, however, I believe the majority correctly decides that the other evidence against appellant is so compelling that, beyond a reasonable doubt, Bergendahl's statements did not prejudice the members' findings."

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN, IN TESTING FOR HARMLESS CONSTITUTIONAL ERROR, IT QUANTITATIVELY ASSESSED THE SUFFICIENCY OF THE "OTHER EVIDENCE" TO SUPPORT PETITIONER'S CONVICTIONS RATHER THAN QUALITATIVELY ASSESSING THE HEARSAY STATEMENTS' CONTRIBUTORY IMPACT ON THOSE CONVICTIONS

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Honorable Court stated the harmless error test to be whether the State has met its burden of demonstrating that admission of the unlawful evidence did not contribute to the conviction. *See* 499 U.S. at ___, 111 S.Ct. at 1257. Therein, this Court also expressly acknowledged rejection of "a much more lenient rule" which would allow affirmance of a conviction if the evidence other than that which should not have been admitted was sufficient to sustain the verdict. 499 U.S. at ___, 111 S.Ct. at 1264.

In the instant case it is clear that the Court of Appeals for the Armed Forces erroneously applied the rejected

"more lenient rule," finding that the other testimonial and documentary evidence admitted against Petitioner "compellingly establish appellant's guilt beyond a reasonable doubt . . . " In limiting its review to a quantitative assessment of evidentiary sufficiency, the Court of Appeals for the Armed Forces failed to conduct the more stringent and *required* qualitative assessment as to whether the Government had demonstrated that admission of Mr. Bergendahl's statements did not contribute to Petitioner's convictions.

Petitioner submits that the record, on its face, affirmatively demonstrates connectivity between Mr. Bergendahl's statements and Petitioner's convictions. The Government's documentary exhibits against Petitioner consume more than one volume of the record. See Volumes III and IV. The documents that lead off this stack of prosecutorial exhibits, the first to be seen and presumably reviewed by the members during their deliberations are Mr. Bergendahl's statements, Pros. Exs. *1 and 2,* First and Second.

As reflected in trial counsel's initial proffer of the statements' reliability, they were there to be corroborated by the other evidence—as Petitioner asserts, they were the heart of the Government's case, the basis for Government drafting of at least some of the charges and the trellis upon which the members were repeatedly encouraged to train the other evidence. Having asked the members to rely upon Mr. Bergendahl's statements as a trustworthy basis upon which to premise Petitioner's convictions, the Government has not, indeed cannot, now show that these same statements did not contribute to Petitioner's convictions.

Unfortunately, the U.S. Court of Appeals for the Armed Forces did not analyze the case from this, the proper, perspective. In utilizing the expressly rejected "more lenient rule" and ascertaining only whether the other, lawful evidence of the case was sufficient to sustain the Petitioner's convictions, the Court of Appeals failed, to the

substantial prejudice of Appellant, to measure his case against proper Constitutional standards.

II. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FAILED TO CONSIDER THE CONTRIBUTORY IMPACT ON PETITIONER'S SENTENCE OF HEARSAY STATEMENTS ADMITTED IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

In stating that any error regarding the admissibility of Mr. Bergendahl's statements was harmless error, the U.S. Court of Appeals limited its finding of harmlessness "to the offenses" and cited to the case of *Arizona v. Fulminante* 499 U.S. 279 (1991). *See* 42 M.J. 355. While *Arizona v. Fulminante,* dealt only with how a coerced confession may have potentially impacted upon a finding of guilty, the more seminal case on constitutional harmless error testing, *Chapman v. California,* 386 U.S. 18 (1967), indicates that the test for harmless error applies not only to the findings phase of a trial but to all phases: ". . . before a federal constitutional error can be held harmless, the court must be able to declare belief that it was harmless beyond a reasonable doubt." *Id.* at 20. *Chapman* says nothing about limiting the test for harmlessness to some partial phase of trial encompassing less than the totality of the proceedings.

In military courts-martial, members not only act as the factfinding body, but they also hear evidence on and adjudge the sentence in the case. *See* Article 51(a), Uniform Code of Military Justice. Typically, the sentencing phase occurs immediately following the announcement of findings, *see* Rule for Courts-Martial 1001(a)(1),

Manual for Courts-Martial, United States (1995 edition), and the members, unless specifically instructed otherwise, are permitted to consider for sentencing purposes all the evidence with which they were previously provided for findings. Hence, in the instant case, Mr. Bergendahl's statements were before the members not only on findings, but during the sentencing phase of the trial as well.

Trial counsel made use of that fact as indicated by both his implicit and explicit references to them during sentencing argument. Preying upon Mr. Bergendahl's predilection for blameshifting, see *Williamson v. United States*, ___ U.S. ___, ___, 114 S.Ct. 2431, 2437 (1994) (O'Conner, J.) (''Small fish in a big conspiracy often get shorter sentences than people who are running the whole show [citations omitted]''), trial counsel implicitly utilized Mr. Bergendahl's statements to argue that Petitioner was deserving of a harsher sentence than what he might otherwise receive because he was a ''big fish,'' a mastermind and ringleader who ran the show that was the ''Sutton plan.''

Petitioner's sentence (including a dishonorable discharge, 3 years confinement, and an $84,000 fine) speaks to trial counsel's successful utilization of the ''big fish'' argument. Petitioner submits that there is simply no way, particularly given trial counsel's implicit and explicit argument of them, that Mr. Bergendahl's hearsay statements did not contribute to the sentence which he (Petitioner) received. The Court of Appeals, however, completely failed to address in any way the impact of Mr. Bergendahl's statements upon Petitioner's sentence. They simply did not conduct a complete analysis of harmless error with regard to Petitioner's case.

CONCLUSION

On its face, the constitutional harmless error test, as established and discussed by this Honorable Court in

Chapman v. California, 386 U.S. 18 (1967) and *Arizona v. Fulminante*, 499 U.S. 279 (1991), is one of ready apprehension and simple application. In the instant case, however, the Court of Appeals for the Armed Forces has demonstrated both an apparent misunderstanding and misapplication of the test. They failed to apply the test to the entirety of the trial proceedings (including the sentencing phase) and when they did apply the test to the findings phase, they utilized the wrong standard of measurement. They did not seek to assess the hearsay statements' contributory impact upon findings; indeed, neglecting to even consider them, they looked only to the remaining "other evidence" to determine whether there was a quantitative sufficiency of the evidence.

The Court of Appeals for the Armed Forces sits to ensure civilian oversight of military courts-martial. Such oversight is without meaning where the Court fails to comprehend and properly apply the Law of the Land.

WHEREFORE, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the U.S. Court of Appeals for the Armed Forces.

Respectfully submitted,

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